IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRADBURN PARENT/TEACHER STORE, INC.	:	CIVIL ACTION
v.	:	
3M (MINNESOTA MINING AND MANUFACTURING COMPANY)	:	NO. 02-7676

Padova, J. **MEMORANDUM** **July __, 2003**

Defendant 3M (Minnesota Mining and Manufacturing Company) (hereinafter "3M") has filed a motion to dismiss Plaintiff's Complaint in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons that follow, the Court grants Defendant's Motion in part and denies Defendant's Motion in part.

I. PRIOR HISTORY

The conduct of Defendant which forms the basis of this lawsuit was the subject of a prior lawsuit in this Court, LePage's v. 3M, Civ. A. No. 97-3983, 2000 U.S. Dist. Lexis 3087 (E.D. Pa. Mar. 14, 2000)(the "Lepage's litigation"). In that suit, a competing retailer of transparent tape, LePage's, Inc., sued Defendant alleging, inter alia, unlawful maintenance of monopoly power in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. After a nine-week trial, the jury found in favor of LePage's on its unlawful maintenance of monopoly power claim, and awarded damages of $22,828,899.00, which were subsequently trebled to

$68,486,697.00. See id. This Court subsequently denied Defendant's Motion for Judgment as a Matter of Law with respect to this claim. See id. A panel of the United States Court of Appeals for the Third Circuit ("Third Circuit") initially reversed this Court's Order upholding the jury's verdict and directed this Court to enter judgment for Defendant on LePage's's unlawful maintenance of monopoly power claim. LePage's, Inc. v. 3M, 277 F.3d 365 (3d Cir. 2002) ("LePage's I"). Upon rehearing en banc, the Third Circuit vacated the panel decision and reinstated the jury verdict against Defendant on LePage's's unlawful maintenance of monopoly power claim. LePage's, Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003) ("LePage's II").

II. THE COMPLAINT

The Complaint alleges one count of monopolization in violation of the Sherman Act, 15 U.S.C. § 2. The Complaint alleges that Defendant unlawfully maintained its monopoly in the transparent tape market through its bundled rebate programs[1] and through exclusive dealing arrangements with various retailers. The Complaint asserts that, as a result of Defendant's conduct, Plaintiff and other members of the proposed Class have "suffered

[1] As discussed at length in the LePage's litigation, Defendant's bundled rebate programs provided purchasers with significant discounts on Defendant's products. However, the availability and size of the rebates were dependant upon purchasers buying products from Defendant from multiple product lines. See LePage's II, 324 F.3d at 154-55.

antitrust injury." (Compl. ¶ 27). The damages period in this case runs from October 2, 1998 until the present. (Compl. ¶ 2).

Plaintiff seeks declatory relief, permanent injunctive relief, treble compensatory damages, attorney's fees, costs and interest. (See Compl. ¶¶ A-F).

Plaintiff seeks to join other direct purchasers of Defendant's transparent tape from October 2, 1998, and the present as a class under Rule 23 of the Federal Rules of Civil Procedure.

Plaintiff seeks offensive collateral estoppel as to four issues decided in the LePage's litigation. First, Plaintiff seeks offensive collateral estoppel as to the definition of the relevant market for transparent tape.[2] (Compl. ¶ 17). Second, Plaintiff seeks offensive collateral estoppel as to Defendant's monopoly power in this market.[3] (Id.) Third, Plaintiff seeks offensive collateral estoppel as to the "exclusionary and unlawful nature" of Defendant's bundled rebate programs. (Id.) Fourth, Plaintiff seeks offensive collateral estoppel as to the harm to competition caused by and resulting from Defendant's violation of Section 2 of the Sherman Act. (Id.)

---

[2] On appeal in the Lepage's litigation, "the parties agreed that the relevant product market is transparent tape and the relevant geographic market is the United States." LePage's II, 324 F.3d at 146.

[3] Defendant conceded in the LePage's litigation that it possessed monopoly power in this market, with a 90% market share. LePage's II, 324 F.3d at 146.

III. LEGAL STANDARD

A claim may be dismissed under Federal Rule of Civil Procedure 12(b)(6) only if the plaintiff can prove no set of facts in support of the claim that would entitle her to relief. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir.1994). The reviewing court must consider only those facts alleged in the complaint and accept all of the allegations as true. Id.

IV. MOTION TO DISMISS

A. Failure to Allege Injury Causally Linked to A Violation of The Antitrust Laws

Defendant argues that Plaintiff has failed to allege facts which could establish a causal link between the anti-competitive conduct that Defendant was found responsible for in the LePage's litigation and the supra-competitive prices that Plaintiff and other class members have allegedly paid for transparent tape during the damages period in this case. The Third Circuit has held that the following five factors must be considered in determining whether a plaintiff has standing to challenge an alleged antitrust violation:

> 1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex

apportionment of damages.

Angelico v. Lehigh Valley Hospital, 184 F.3d 268, 274 (3d Cir. 1999). Thus, a causal link between the antitrust violation and the harm that Plaintiff suffers is a necessary (though not sufficient) component to establishing standing.

There are no special pleading requirements for an antitrust claim. Rather, "Notice pleading is all that is required for a valid antitrust complaint." Municipal Utilities Bd. of Albertville v. Alabama Power Co., 934 F.2d 1493, 1501 (11th Cir. 1991). Furthermore, "the existence of an 'antitrust injury' is not typically resolved through motions to dismiss." Brader v. Allegheny Gen. Hosp., 64 F.3d 869, 876 (3d Cir. 1995). (citations omitted). On the other hand, to survive a Motion to Dismiss, Plaintiff's Complaint must contain more than conclusory allegations of "harm to competition." Microsoft Corp. v. Computer Support Services of Carolina, 123 F. Supp. 2d 945, 951 (W.D.N.C. 2000). Rather, Plaintiff must allege that it has suffered an actual injury "causally linked to a violation of the antitrust laws." Pace Electronics, Inc. v. Cannon Computer Systems, Inc., 213 F.3d 118, 120 (3d Cir. 2000). Thus, "reasonable particularity in pleading" is required under the antitrust laws. Garshman v. Universal Res. Holding, Inc., 625 F. Supp. 737, 741 (D. N.J. 1986). Furthermore, "The pleader will not be allowed to evade this requirement by attaching a bare legal conclusion to the facts that he narrates: if

he claims an antitrust violation, but the facts he narrates do not at least outline or adumbrate such a violation, he will get nowhere merely by dressing them up in the language of antitrust." Id. at 742.

Plaintiff's allegations concerning injury and causation are found in Paragraph 27 of the Complaint, in which Plaintiff alleges as follows:

> As found in LePage's or otherwise, 3M's unlawful maintenance of its tape monopoly has suppressed competition and has maintained prices paid by direct purchasers to 3M well above competitive levels after any 3M rebates (if any) attributable to tape purchases. By 1997, and before the damage period in this action commenced, 3M began implementing one or more increases in its monopoly pricing. These increases were facilitated and maintained by virtue of its exclusionary practices. As a consequence, members of the alleged class purchasing at these prices have all suffered antitrust injury.

(Compl. ¶ 27)(emphasis added). According to Defendant, the Complaint is defective because it

> fails to allege that any price increase for transparent or invisible tape by 3M after October 1998 was anything other than a response to the standard market phenomena of cost increases and inflationary pressure. If [Plaintiff] is saying that, because of LePage's, years later 3M cannot respond to cost increases by adjusting its prices, then the theory is invalid as a matter of law.

(Def. Mot. Dismiss at 6). According to Defendant, in order to survive a Motion to Dismiss, the allegations in Plaintiff's Complaint must support some theory which could explain how price increases, if any, implemented during the damages period were caused by the anti-competitive conduct of Defendant that was at

issue in the LePage's Litigation. Defendant asserts that "[t]here is in fact no causal link between any price adjustment that [Defendant] might make in transparent tape today in response to, for example, cost increases and any of the events at issue in LePage's." (Def's Mot. Dismiss at 2). Defendant points out that the conduct of Defendant which the jury in the LePage's Litigation found to be in violation of the Sherman Act (bundled rebates and exclusive dealing contracts with certain high volume retailers) resulted in decreased prices for the products Defendant sold (Def's Reply Mem. at 5). Thus, while this conduct undoubtedly harmed LePage's, see LePage's II, 324 F.3d at 160-62, Defendant argues that retailers, who bore the benefit of these lower prices, cannot claim anti-trust injury because of this conduct. See Atlantic Richfield Co. v. U.S.A. Petroleum Co., 495 U.S. 328 (1990) (noting that a plaintiff does not suffer antitrust injury if he is benefitted, and not harmed, by anti-competitive conduct.)

Defendant further notes the failure of Plaintiff's Complaint to assert a "recoupment" theory under Brooke Group, Ltd. v. Brown and Williamson Tobacco Corp., 509 U.S. 209 (1993). In Brooke Group, the United States Supreme Court held that the practice of pricing goods below cost in order to remove competitors from the relevant market, and then subsequently raising prices in order to recoup the losses sustained because of the below-cost pricing, was illegal under the antitrust laws. See id. at 226. Plaintiff's

Complaint, however, contains no allegations which would support a "recoupment" theory. This is not surprising, considering that there was no evidence in the LePage's Litigation that Defendant priced its transparent tape below its cost. Indeed, Plaintiff appears to specifically disclaim any reliance upon a theory of "recoupment" under Brooke Group. (Pl's Opp. Mot. Dismiss at 11-12).

However, the allegations in Plaintiff's Complaint do support at least one theory of causation which could entitle Plaintiff to relief. Plaintiff alleges in the Complaint that Defendant "has maintained prices paid by direct purchasers to 3M well above competitive levels after any 3M rebates (if any) attributable to tape purchases." (Compl. ¶ 27.) Plaintiff's response to the Motion to Dismiss elaborates that "3M, from the start maintained its prices at monopoly levels prevailing before it began its illicit and exclusionary scheme in 1992, which was intended to protect and maintain those anti-competitive prices." (Pl's Opp. Mot. Dismiss at 12). Plaintiff further asserts that "whatever the size of rebates given to the largest class members, they were still rebates off a monopoly price." (Pl's Opp. Mot. Dismiss at 13). Thus, the allegations in the Complaint appear to assert that the bundled rebates and exclusive dealing that Defendant engaged in allowed Defendant to maintain its monopoly in the transparent tape market and stifled competition from Lepage's (and possibly other competitors), which in turn allowed Defendant to maintain supra-

competitive prices for transparent tape.

According to Defendant, Plaintiff's claims cannot be reconciled with the fact that, at least while the bundled rebate program was being instituted, retailers that received the bundled rebates paid less for the total amount of goods they received from Defendant than they would have paid had they bought these products from other suppliers. (Def's Reply Mem. at 5). However, Plaintiff does allege in the Complaint that Defendant "has maintained prices paid by direct purchasers to 3M well above competitive levels after any 3M rebates (if any) attributable to tape purchases." (Compl. ¶ 27.)(emphasis added). Thus, Plaintiff's allegations, if proven, could establish that, were it not for Defendant's anti-competitive conduct, Plaintiff would have paid less for transparent tape than it actually paid during the damages period, even when any bundled rebates or other discounts are taken into account. Under this theory of damages, it is not necessary for Plaintiff to allege the existence of price increases during the damages period for it to survive a Motion to Dismiss.

This theory of the case is supported by the Third Circuit's en banc decision in LePage's II. The opinion in LePage's II exhaustively details the plummeting demand for LePage's's tape following the introduction of Defendant's bundled rebate programs, which in turn drastically decreased LePage's's market share during the period from 1992 to 1997. See Lepage's II, 324 F.3d at 161-62.

The court noted that, "Had 3M continued with its program it could have eventually forced LePage's out of the market." Id. at 162. The court also noted that "3M's exclusionary conduct not only impeded LePage's ability to compete, but it also harmed competition itself. . . ." LePage's II, 314 F.3d at 162. Plaintiff's allegations, in turn, could establish that, had Defendant's conduct not drastically reduced the market power of LePage's, the prices that plaintiff paid for transparent tape would have decreased to the point where they were less than the price Plaintiff actually paid for transparent tape during the damages period, even after any rebates or discounts provided by Defendant are taken into account.

The cases Defendant cites do not alter the Court's conclusion. Defendant cites to Schuylkill Energy Resources v. Pennsylvania Power and Light Co., 113 F.3d 405 (3d Cir. 1997), for the proposition that dismissal under Rule 12(b)(6) is proper where the claim of antitrust injury rests upon "unsupported conclusions" or "unwarranted inferences". However, the court in Schuylkill was faced with a plaintiff who was at the current time legally barred from competing with the defendant in the relevant market. The court held that the plaintiff's potential entry into the market at a later point in time (based upon planned de-regulation of the electricity market) was too speculative to allow it to recover for antitrust injury. Id. at 418. Here, there is no dispute that Plaintiff was a direct purchaser in the market for transparent tape

from October 2, 1998 until December, 2000. Furthermore, as discussed, supra, the allegations in Plaintiff's Complaint, if proven, do support at least one theory of causation which could entitle Plaintiff to relief.

B. Dismissal of Indirect Purchaser Damages Claims Based Upon Illinois Brick

Defendant seeks to dismiss any claims for damages based upon conduct that occurred after December, 2000. Plaintiff concedes that at this time it ceased to be a direct purchaser of transparent tape from Defendant, and, therefore, that it has no standing to obtain money damages on its own behalf for alleged overcharges which occurred after this date. (Pl's Opp. Mot. Dismiss at 10); see also Illinois Brick v. Illinois, 431 U.S. 720 (1977). Thus, to the extent that Plaintiff's Complaint can be read to seek money damages on its own behalf based upon damages incurred after December, 2000, this portion of Plaintiff's Complaint will be dismissed by agreement of the parties.[4]

V. CONCLUSION

For the reasons discussed above, to the extent that Plaintiff's Complaint can be read to seek money damages on its own

[4] The parties dispute whether Plaintiff can represent a class of purchasers who directly purchased transparent tape after December, 2000. This issue is properly decided on a motion for class certification, and the Court expresses no opinion on this question at this time.

behalf for damages incurred after December, 2000, this portion of Plaintiff's Complaint will be dismissed by agreement of the parties. Defendant's Motion to Dismiss is denied in all other respects. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRADBURN PARENT/TEACHER STORE, INC.	:	CIVIL ACTION
v.	:	
3M (MINNESOTA MINING AND MANUFACTURING COMPANY)	:	NO. 02-7676

O R D E R

AND NOW, this 22nd day of July, 2003, upon consideration of Defendant's Motion to Dismiss Plaintiff's Complaint (Document # 41), Plaintiff's Response (Document # 43), and all related submissions, **IT IS HEREBY ORDERED** as follows:

A) By agreement of the parties, to the extent that Plaintiff's Complaint can be read to seek money damages on its own behalf for the period after December, 2000, this portion of Plaintiff's Complaint is **DISMISSED**; and

B) Defendant's Motion to Dismiss Plaintiff's Complaint is **DENIED** in all other respects.

BY THE COURT:

_____

John R. Padova, J.